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In the Supreme Court of the United States.

OCTOBER TERM 1908.

THE NEW YORK CENTRAL AND HUDSON RIVER RAIL ROAD COMPANY, Plaintiff-in-error, vs. THE UNITED STATES.	No. 69.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

Statement.

This case comes up on a writ of error after conviction of the plaintiff-in-error upon an indictment charging it with the payment of a rebate of $26,141.81 to the American Sugar Refining Company in violation of the Interstate Commerce Act of February 4, 1887, and its amending statutes including the Elkins Law of February 19, 1903. The material provisions of these laws are set out hereafter in the brief. The indictment was filed on March 24, 1906, and contained two counts, both charging as an offense the same transaction and differing only as to the form of allegation. After its demurrer had been overruled (Rec., p. 10; 146 Fed. Rep., 298) the defendant pleaded not guilty and was tried on November 14, 1906, on both counts, the trial resulting in a general verdict of guilty, and it was sentenced to pay a fine of $18,000.

The Indictment.

The first count of the indictment, after setting out the formal averments showing the establishment of the interstate through line in question from New York to Cleveland, and the establishment, filing and publication of the lawful tariff upon sugar over it fixing the rate as twenty-one cents per hundred pounds, charges that on November 20th, 1902, the defendant railroad company entered into an unlawful agreement and arrangement with the shipper, The American Sugar Refining Company, whereby it was agreed that in the event of any sugars being shipped over the said line and of the full lawful tariff rates being paid thereon, the railroad company would give a rebate to the said shipper of six cents for each one hundred pounds of sugar transported to Cleveland for reconsignment to points beyond, and four cents for each one hundred pounds transported to Cleveland locally, the said sums, respectively, to be refunded from the lawful amounts paid as aforesaid; that the shipper should present its claims for rebate under the agreement aforesaid and the same should be paid by the railroad company, thereby reducing the lawful tariff by six cents or four cents respectively for each one hundred pounds. The indictment then charges the shipment of sugars under said agreement, the payment of the lawful tariff rates and the presentation of claims for rebate in respect to such shipments of sugars (the amount of each claim, its items and the time of its presentation being to the grand jurors unknown); that thereafter on April 2, 1902, the railroad company paid to the American Sugar Refining Company $26,141.81 by way of rebate for the reduction of the tariff schedules as aforesaid in respect to the transportation of the said sugars under the aforesaid agreement.

The second count of the indictment is substantially the same as the first except that the allegation of a preliminary agreement to pay rebates is omitted.

The Facts Established at the Trial.

The facts in this case evidenced the same reckless disregard of the law on the part of the controlling agents of the railroad company, even at a time when, under the Law of 1887, they were still liable to imprisonment for such actions, as is shown by the Record in Case No. 57 against the same defendant. The transaction was also arranged and carried out with the same effort to conceal its nature from the public and from competitors, as evidenced by its form and by the marking of the correspondence. The evidence as to the methods of bookkeeping and payments in Wilson's office in Buffalo, shown in the other case, was here made unnecessary by the defendant's admission as to the auditing and destruction of its papers, at folio 57.

The following facts were established :

(*a*) That the defendant railroad company, in connection with other carriers and over their respective railways, at the times mentioned in the indictment and during the years 1902 and 1903, had established and was operating a continuous fast freight line or route known as the "Red Line" from the City of New York to the City of Cleveland, Ohio (see waybill, Exhibit 2; rec., fols. 43, 44, 45).

(b) That the defendant had established and filed and published a joint tariff of rates for the transportation of sugars over said route by which at all the times mentioned in the indictment the rate for transportation from New York to Cleveland was 21 cents per 100 pounds (Rec., fols. 45, 46, and Exhibit 1).

(c) At all the times mentioned in the indictment Nathan Guilford and Fred. A. Pomeroy were the general freight traffic manager and assistant freight traffic manager, respectively, of the defendant railroad company and "were authorized to establish rates at which freight should be carried" over its lines, and "to unite with other companies in the establishment, filing and publishing of through rates" (fol. 49; see, also, Exhibits 13, 14, 15, 16 and 17). The witness Palmer

also testified that he had "had occasion to discuss rates over the New York Central and Hudson River Railroad Company" with Guilford and Pomeroy and had "arranged rates over that road with them," and that "those rates have subsequently been carried out by the railroad company" (fol. 51).

(d) That at said times the American Sugar Refining Company was a New Jersey corporation engaged in refining sugar in Brooklyn and Jersey City and selling it throughout the country, and in the course of this business made large shipments to a storage warehouse furnished to it by the Big Four Railway Company (fol. 97) in Cleveland, known as the Merwin Street Warehouse (fols. 46, 50, 51, 97). The sales department of the Sugar Company routed the sugar which it sold to different parts of the country over various railroad routes according to instructions received from Lowell M. Palmer, one of the directors of the Sugar Company (fol. 50). Palmer maintained a regular office at which he handled the railroad business of the Sugar Company, furnishing the sales department the railroad rates at which the sugar was to be shipped, and arranging the routes for such shipments. He also handled claims of the Sugar Company against the different railroads that handled this freight. He was thus the regular traffic manager of the Sugar Company (fols. 50, 51).*

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* *Note*—Palmer also conducted at the same office a lighterage business in which he was engaged individually as partner of the firm of Havemeyer & Elder, the business consisting of transporting in lighters the sugar of the Sugar Company of which Palmer and Havemeyer were officers from the wharves in Brooklyn and Jersey City to the terminals of the various railroads and receiving a certain percentage of the railroad rates for this service. The "lighterage" referred to in the exhibits hereinafter mentioned refers to these charges and has nothing to do with the rebates in question (see fols. 54, 55). The American Sugar Refining Company was also allowed by the railroads out of the railroad rates an allowance of 2 cents per 100 pounds for cartage or transfer on certain all-rail shipments of sugar. This is the cartage referred to in said exhibits and has nothing to do with the rebates (fol. 55).

(e) On the 24th day of July, 1902, Palmer, with his assistant Riley, at the office of Pomeroy, demanded from the defendant railroad company a concession from the regular tariff rate of 21 cents then in force from New York to Cleveland as aforesaid (fols. 51, 52, 53). He testified as his reason for doing this that a cheaper water route which the Sugar Company had been using to Cleveland by the Cleveland Steel Canal Boat Company had proved unsatisfactory, and he desired to have an all-rail route at this special rate to take its place (fol. 52). This demand was acceded to by Pomeroy, and a memorandum (Exhibit 12), was made of the agreement. This agreement was as follows:

"MEMORANDUM MADE JULY 24, 1902.

Present—

Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

Sugar Shipments to Cleveland and Beyond:

1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.

2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4-1/5 cents per 100 pounds.

3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.

4th. The New York Central to make reclamation against Mr. L. M. Palmer for a refund of 1-1/5 cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

5th. *Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause of this memorandum on the basis of 6 cents per 100 pounds.*

6th. This arrangement to apply to all sugar billed to Merwin Street Warehouse whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds.

(*f*) Later, on November 20th, Palmer wrote directly to Guilford (Exhibit 11) and received a reply (Exhibit 18) which fixes the rebate to be allowed on city deliveries in Cleveland at 4 cents as against the 6 cents rebate allowed on shipments for reconsignment beyond Cleveland.

(*g*) Between July 24, 1902, and December 6, 1902, the American Sugar Refining Company shipped 69,944,966 pounds of its sugars from New York to Cleveland over the line to which this agreement applied and paid thereon the full tariff rate of 21 cents per 100 pounds and no more (fol. 46).

(*h*) Thereafter Palmer, purporting to act for the Sugar Company, filed claims against the New York Central for the amount of the rebates agreed upon as aforesaid (fol. 47; see also Exhibits 3, 4, 5, 6, 7, 9, 21, 20, 22; also fol. 57). These claims, though on their face purporting to be for overcharge, were made up by one of Palmer's employees solely upon the basis agreed upon for the rebates and without any evidence of loss or damage or overcharge whatsoever (fols. 57, 58, 59). Each of the claims were addressed to Pomeroy marked "personal" (see exhibits above).

The Issue.

The plaintiff-in-error raises in this case the questions considered at length in No. 57. Certain formal objec-

tions to the indictment are also made. The main question, however, involved here is the assignment of error to the Court's refusal to direct a verdict of acquittal upon the ground that the evidence disclosed that the shipments of sugar as to which a rebate was paid were made in 1902 prior to the enactment of the Elkins Act, although the rebate was paid in March, 1903, after that Act was in force (fol. 60).

Judge HOLT denied the motion (fols. 60–65) after hearing elaborate argument by Mr. Choate who appeared as *amicus curiæ*, and as counsel for the shipper, the American Sugar Refining Company.

The issue briefly stated is this :

Does the payment of a rebate after the Elkins Act was in force constitute an offense under the Interstate Commerce laws, including Section 1 of the Elkins Act, although the agreement to charge less than the lawful tariff rate and the shipments pursuant thereto, in respect to which the rebates were paid, were made prior to the Elkins Act and while the Interstate Commerce Act of 1887 was in force ?

Outline of the Government's Replies to the Brief of the Plaintiff-in-Error.

FIRST. Plaintiff-in-error's point that Congress has no power under the Constitution to punish it criminally by reason of the matters described in the indictment, is answered by our Point One in our case No. 57.

SECOND. Plaintiff-in-error's Second Point, which is in substance that the provisions of the Elkins Act, declaring that " the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier as well as of that person," is unconstitutional, is answered by Points Two and Three of our brief in case No. 57.

THIRD. Plaintiff-in-error's contention that the transaction set forth in this indictment was not punishable

under the Elkins Act because that act was passed after the property mentioned in the indictment had been transported, is discussed in the present brief under Points One, Two, Three and Four.

FOURTH. Plaintiff-in-error's Fourth Point, to the effect that the acts set forth in this indictment did not constitute a crime under the Elkins Act or under any other federal statute, is discussed in the present brief under Point Three.

FIFTH. Plaintiff-in-error's contention in Points Five, Six and Seven of its brief, are answered in Points Three and Five of the present brief.

The Statute.

The Elkins Law (32 Stat., 847) reads as follows:

> That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it

shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisoned wherever now prescribed as part of the penalty being here abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offence had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any

officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

ARGUMENT.

POINT ONE.

Under the law as it stood before the Elkins Act, the agreement of July 24th, 1902, was unlawful and its fulfillment a crime on the part of the agents of the carrier.

The agreement in question contemplated the making of certain shipments, the payment of the freights thereon at regular tariff rates and the repayment at a future time of a certain portion of these rates as a rebate.

1. Looked at commercially this was a continuous transaction which would not be complete until the final payment of the rebate reduced the compensation

of the carrier to the amount agreed upon between the parties. During all of that continuous period, there would be pending a continuous interstate transaction between the shipper and the consignee, every step of which was subject to Congressional control.

2. Looked at from the standpoint of the already existing Interstate Commerce Act, it was also an illegal and criminal arrangement which

(a) made the agents of the carrier criminally liable in case they completed the crime by the payment of the rebate (Interstate Commerce Act, Secs. 6 and 10, 24 Stat. 379, 1 Supp., 529), and

(b) was by reason of its illegality wholly unenforceable against the carrier corporation.

The carrier corporation could, at any time, decline to complete the transaction by the payment of the rebate.

Texas & Pac. Ry. Co. vs. Mugg, 202 U. S., 242.
Gulf R. R. Co. vs. Heffley, 158 U. S., 98; see, also,
Hawley vs. Kansas Coal Co., 48 Kans., 593, 598.
Fitzgerald vs. Grand Trunk Railway Co., 63 Vt., 169.

3. From these considerations, it is apparent, first, that the entire transaction was under federal jurisdiction, and second, that no vested rights had intervened in favor of any party which would prevent Congress from exercising such jurisdiction.

N. Y., N. H. & H. Ry. Co. vs. Interstate Commerce Commission, 200 U. S., 361;
Armour Co. vs. United States, 209 U. S., 56.

On the contrary, the human agents of the corporation would be criminals under already existing law, if they carried it out, and the transaction on the part

of their corporation, though not yet criminally punishable, was already denominated illegal under the law (Interstate Commerce Law, Sec. 6).

POINT TWO.

The avowed purpose of the Elkins Act was to make the existing law more effective.

For at least ten years prior to the enactment of the Elkins Law, the Interstate Commerce Commission had reported annually to Congress the ineffectiveness of the existing law and had suggested amendments which would make it more effective. Thus, in 1902, just before the Elkins law was enacted it reported :

> " The Commission believes to-day, as it has in the past, that this whole law should be revised upon some correct theory and some workable basis. * * * It is possible, however, that the same causes which have prevented serious consideration of this subject in the past may continue to operate in the future. In that event, in view of the gross violations of the statute herein referred to we would suggest that if it is not possible to amend this law in its more essential features, it ought at least be possible to deal with those coercive features of the act which are intended to prevent practices of this character "
>
> 15 An. Rep. Int. Com. Com., 7.

See, also,

4 An. Rep. Int. Com. Com., 666.
6 *id.*, 39.
10 *id.*, 115.
11 *id.*, 60.
14 *id.*, 5.
16 *id.*, 6.

There had been in 1901-1902 an investigation into the beef packing industries, which resulted in the disclosure of widespread violations of the existing law (15 An. Rep. Int. Com. Com., 6).

In the House of Representatives, when the Elkins Bill was under debate, Mr. Hepburn, its sponsor, asserted that during the sixteen years of the existence of the law of 1887, not one single criminal conviction had been obtained, and that it was the purpose of the new bill to " remedy that difficulty " (36 Cong. Rec., pp. 2151-2159).

The courts have frequently commented upon this well-known purpose of the Elkins Law.

Armour Packing Co. vs. United States, 209 U. S., 56, 72.

N. Y., N. H. & H. R. R. Co. vs. Interstate Commerce Commission, 200 U. S., 361, 391.

Interstate Commerce Commission vs. Reichman, 145 Fed., 235, 240.

There can be no doubt, therefore, as to the purpose of Congress to pass a law which would be immediately drastic and effective.

POINT THREE.

The payment of the rebate charged in the indictment and established by the evidence was a crime punishable under the Elkins Act, although the goods in question had been transported prior to the enactment of that law.

A.

An analysis of the first section of the Elkins Law, as well as its history, shows that its several provisions over-

lap and that certain cases may be punishable under either of several clauses.

As has been already pointed out, the Elkins Law was passed on the urgent recommendation of the Interstate Commerce Commission, setting forth that the old law was being violated and that certain forms of abuses and evasions were prevalent. The Commission had reported specifically as to these abuses and had recommended specific bills to put an end to them. When in 1903, Congress finally enacted this legislation, it did so in the form of specific prohibitions aimed at the respective abuses pointed out by the Commission rather than by a single treatment of the entire group of subjects such as is found in the original law. But the central object of the law, as it had been the most emphatic recommendation of the Commission, was that any departure from the published tariff should be made *ipso facto* punishable criminally, by all persons concerned, the carrier and the shipper, the corporation and the natural person. The various provisions of Section One arise from an attempt to cover all of the methods by which a violation of this central object might be achieved.

It must be evident, therefore, that a single state of facts may necessarily come under and be described by more than one of these provisions of the law. The payment back by the carrier to the shipper of a certain sum of money under certain circumstances will result at one and the same time *(a)* in that carrier "collecting a less compensation for the transportation of property than is specified in the schedule filed with the Commission in force at the time" and *(b)* in the "willful failure" on the part of that carrier "to strictly observe such tariffs," and *(c)* in the payment of a "rebate" whereby certain property is "transported at a less rate than that named in its tariffs."

In such a case it is quite immaterial whether Congress has in this law created three distinct but precisely similar crimes, each of which a given state of facts

satisfies; or whether Congress has attempted to create but a single crime denounced under three distinct descriptions.

Provided that the charges stated in the indictment are sufficient within the rules of pleading to constitute a crime and to sufficiently apprise the defendant as to what he has to meet, it is immaterial how the offense is labeled.

Williams vs. United States, 168 U. S., 382.

The situation as presented by this statute is not unlike that presented under section 5421 of the Revised Statutes, which was discussed in the Crain case by this Court:

> "The statute was directed against certain defined modes for accomplishing a general object and declared that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than one thousand dollars. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to the accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced in it."
>
> *Crain vs. United States, 162 U. S., 625, 636.*
> See, also, *Kellogg vs. United States, 126 Fed. Rep., 323 (C. C. A.).*

The argument in the third point of our opponent's brief addressed to the question of the validity of the

Elkins Law as to shipments made prior thereto, goes upon the assumption that this issue is to determined solely by the language of the so-called rebate clause of the Elkins Law. This is a wholly unfounded assumption. On the contrary, as the court below pointed out, the charge and the proof substantiated an offense denounced in two other clauses of the Elkins Law. These we shall take up in their order.

B.

The record shows an offense under the first sentence of the Elkins Act.

This sentence makes the corporate common carrier liable for every misdemeanor committed by its agents under the Interstate Commerce Law. The indictment herein sets forth and the uncontradicted evidence establishes that the officers and traffic agents of the railroad company willfully "charged, collected and received" from The American Sugar Refining Company "less compensation for the transportation of the property than was specified in the schedule filed with the Commission in force at the time" (Interstate Commerce Law, Sec. 6; 24 Stat., 380). And this, under section 10 of the old law, was a misdemeanor on their part. Until April 2, 1903, the full tariff rate had been paid. Not until the actual payment of the rebate was the offense of collecting less compensation than the tariff provided completed.

> "The objection that the indictment does not state the day or days upon which the shipments were made is, in my judgment, equally unsound. The transaction, as it turned out, was a continuing one until closed by the payment of the rebate, and was at no time unlawful until the rebate was paid. The payment of the rebate, as a single transaction, individualized the whole transaction to which it related as of that day. Each and all

of the shipments upon which the rebate was paid may be regarded as a transaction closed upon the date the rebate was paid, and it is sufficient to state a transaction as of the day it was closed. Neither is it necessary to charge that, when the shipments were made, it was intended to demand and receive a less rate than the schedule rate, and that the subsequent rebate was only the actual carrying out of such intention. The parties may not have intended to violate the law when the shipment was made, but are none the less guilty if, by any subsequent conduct, fairly connected therewith, they compassed the result which the law prohibited."

United States vs. Hanley, 71 Fed., 672, 675.

The same ruling was made by Judge HOUGH in the recent case of *United States vs. Great Northern Railroad Company*, 157 Fed. Rep., 288, arising under the Elkins Act :

"When the transaction was completed the Elkins Act had made each and every part thereof not only unlawful but a criminal offense. One part thereof and certainly the most important was giving the rebate and accepting the same and it is a refinement of language to say that the rebate was given or accepted until the amount thereof was paid. This occurred in 1904 and this Act was the crime complained of in the indictment. A solvent contractor may be said to have given some pecuniary advantage to another when he has agreed to give it, his contract being enforceable in ordinary course of law; but if a man agrees to give another an unlawful pecuniary advantage something not enforceable at law at all, it appears to me plain that the person to whom the promise is made has gotten nothing whatever until he has received and pocketed the pecuniary fruits of such illegal arrangement."

C.

The record discloses "a willful failure strictly to observe the published tariff," which is an offense under the first clause of the second sentence of the Elkins Act.

Prior to April 2, 1903, the published tariff was observed. It needs no additional argument to demonstrate that not until the payment of the rebate on that day was there a failure to observe the published tariff.

D.

The record discloses the giving of a rebate in violation of the second clause of the second sentence of the Act.

This clause, which is the one upon which our opponents' entire argument rests, reads as follows :

> " And it shall be unlawful for any person, persons, or corporations to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carriers as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination practiced " (32 Stat., 847).

Our opponents' argument involves two contentions :—

(1) That the relative clause " whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs," etc.,

refers solely to the physical transportation of the goods, and

(2) That the use of the word "shall" necessarily gives to that clause the effect of a new and substantive enactment having a time necessarily future to the time of the enactment of the Elkins Law. Each of these contentions is erroneous.

FIRST.—This relative clause does *not* refer solely to the physical transportation of the goods, but looks to such transportation in connection with the settlement of freight charges. Our opponents' interpretation of it completely divorces it from the words by which it is governed, the words "to give any rebate." The construction of the sentence is "it shall be unlawful to give any rebate whereby any property shall be transported at a less rate than that named in the tariffs." Of course, a rebate does not cause property to be *physically* transported. Therefore, the clause must refer to the *commercial* transaction—beginning with the shipment and ending with the payment of the rebate—and the goods are not "transported at a less rate than the tariff" until the rebate is paid. Up to that time the goods have been "transported" but they have not been "transported at a less rate than the tariff." The construction of our opponents is accomplished only by emphasizing the word "transportation" to the entire disregard of its accompanying qualifying words "at a less rate, etc." It follows, therefore, that the word "shall" is used with perfect propriety because the clause in which it stands relates to the time of the payment of the rebate, long after the enactment of the statute.

SECOND. Our opponents, by their emphasis upon the word "shall," virtually reconstruct the clause to read:

> "whereby any such property *which shall hereafter be transported*, shall be *so* transported at a less rate than that named, etc.,"

thus giving the word "shall" the meaning of a sub-

stantative enactment relating to transportation instead of a mere relative, referring to the giving of a rebate.

It is well settled that the use of the word "shall" in a clause like the present does not necessarily import a new and substantive enactment in the statute. In *Queen vs. Inhabitants*, 12 Q. B. Rep., 149, the Court was called upon to pass upon a statute regarding the removal of paupers from one parish to another which excluded from a five years' period of residence whereby the paupers were made irremovable, the time during which a person "*shall receive* relief from any parish * * * in which such person does not reside." This law had a penal feature imposing a forfeiture upon any person unlawfully procuring the removal of paupers. This statute was passed in 1846. The pauper in question had resided in St. John's Parish from 1839 until the order of removal in 1847, but had been receiving relief continuously from Christ's Church, the other parish, since 1843. The question was whether the period of time during which the pauper had been receiving relief before the passage of the statute was to be deducted from the period of her residence in St. John's. There, as here, the grammatical argument was relied on that "shall receive relief" merely referred to future relief, viz., after the date of the statute. The court denied the contention in language precisely applicable here :

> "The word 'shall' decides rather the happening of the event, on which the exception is to apply, within the time assumed to have been computed, than the future relation of such event to the time when the statute passed. It denotes the subjunctive mood rather than the future time."

Applying Lord DENMAN'S language to the Elkins Act and to the case at bar :

> "The word 'shall' decides rather the happening of the event, namely, the giving of a rebate (by

which, according to the decision in *United States v. Hanley, supra*, what was previously lawful became unlawful) than the future relation of the physical shipment on which such payment was made to the time when the Elkins Act was passed."

See, also,

People vs. Hawker, 152 N. Y., 234, aff'd 170 U. S., 189.
Commonwealth vs. Dracut, 8 Gray (Mass.), 455.
Forbes vs. State, 2 Penn. (Del.), 197, 203.
Fitzpatrick vs. Simonson, 86 Minn., 140.

The question of whether a clause like this is to be interpreted as an adjective clause or (as our opponents contend) as a substantive enactment, depends upon the *context* and the *purpose* of the law of which it is a part. Such was the canon of interpretation laid down by Chief Justice MARSHALL in *United States vs. Maurice*, 2 Brock., 96, in determining whether the constitutional provision that the President

> "Shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors * * * and all other officers of the United States, whose appointments are not herein otherwise provided for and *which shall be established by law.*"

He decided the question as to whether this italicized clause was an adjective or substantive provision by determining which interpretation "agrees with the general spirit of the constitution" (2 Brock., pp. 100–101). So here, when judged by the general purpose and context of this law, there can be no doubt that this clause was merely an adjective provision defining the character of the proposed rebates.

(a) The Elkins Law was merely an amending statute. The practices under consideration were already a crime

when committed by human agents. There was no object, therefore, in making any exceptions from the immediate operation of the Act as all such practices were already illegal. And, as we have already pointed out, the avowed object of the Congress was that all rebates should stop immediately. The construction of the Government fulfills that intention. Defendant's construction violates it as to certain payments.

(b) We have fully discussed the argument afforded from the context of the clause itself. The other clauses of the Act similarly enforce our construction. Of the three penal clauses which we have discussed under B, C and D, *supra*, the two former, relating solely to the carrier, as we have already pointed out, have no such limitations as to past shipments as our opponents seek to read into the third clause now considered. If, therefore, their contention is successful in importing such a distinction into the third clause which affects *both carriers and shippers*, the result will be a discrimination in the liability of shippers and carriers as to such shipments. Carriers will be liable in cases like this, under the first two clauses, where a shipper, whose liability is confined to the third clause, will escape altogether. Such a result is in conflict with the purpose of the law, adverted to by this Court in the *Armour* case, to make the liability of carriers and shippers the same, so far as possible.

POINT FOUR.

The Act, under the Government's construction, is not in any sense retroactive or ex post facto.

It looks forward and not backward to the offense which it denounces, namely, the payment of the rebate. It affects no vested rights for all agreements or

arrangements looking towards rebates were illegal and unenforceable. It was a simple exercise of the plain intention of Congress as demonstrated in countless ways.

In passing upon a similar indictment, charging the payment of a rebate in 1904 after the Elkins Law, in respect to property transported before the Elkins Law in 1902, Judge HOUGH said :

> "Assuming that the offense sought to be reached by this indictment is the giving—*i. e.*, the paying—of rebate moneys in 1904, the Elkins Act is not *ex post facto*. It did not impose a punishment for an act which was not punishable when it was committed. Nor did it impose additional punishment for such act, nor did it change the rules of evidence ; and if it did none of these things it does not transgress the constitutional limitations referred to."
>
> *United States vs. Great Northern R. R. Co.*, 157 Fed. Rep., 288, 290.

In this case, therefore, Congress did not penalize something heretofore lawful. It merely provided more effective remedies for proscribed illegalities. All the more applicable, therefore, is the doctrine invoked by this Court in the *Chesapeake and Ohio Coal* case, where it was held that an agreement between carrier and shipper, though lawful when made, is subject to the instantaneous prohibitions of the Elkins Law and cannot be carried so as to offend its provisions (*N. Y. N. H. & H. R. R. Co. vs. Interstate Commerce Commission*, 200 U. S., 361; so also *Armour Co. vs. United States*, 209 U. S., 56).

POINT FIVE.

Other points raised by plaintiff-in-error may be briefly disposed of.

Under its Fourth Point (p. 39), plaintiff-in-error argues that the indictment is bad either for duplicity or for ambiguity. The objection as to duplicity was never taken either by demurrer or at the trial. It is, therefore, waived even if it did exist (*Conners vs. United States*, 158 U. S., 408, 411; *Morgan vs. United States*, 148 Fed. Rep., 189).

As to ambiguity, we submit that each count of the indictment clearly and plainly sets out the offense charged in terms more full and more precise than would be required under the rule laid down by this Court in the *Armour case* (209 U. S. at p. 84).

So far as it is claimed that the indictment is ambiguous in that it charges an offense which is denounced by all three clauses of the Elkins Law, it has been fully treated under Point Three.

We think that all the other contentions of plaintiff-in-error's Fourth, Fifth, Sixth and Seventh Points have been fully answered in the course of our discussion in this brief.

We respectfully submit that the judgment of the Court below is right and should be affirmed.

CHARLES J. BONAPARTE,
Attorney-General.
WADE H. ELLIS,
Assistant to
the Attorney-General.
HENRY L. STIMSON,
United States Attorney.